

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE
APPLICATION FOR BENEFICIAL
PERMIT 411-105511 BY
FLYING J INC.

FINAL
ORDER

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the August 2, 1999, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 411-105511 is granted to Flying J Inc. to appropriate 200 gallons per minute up to 60 acre-feet of groundwater at a point in the SE1/4 of Section 17, Township 11 North, Range 03 West, in Lewis and Clark County, Montana. The permitted uses are 80 gallons per minute up to 40 acre-feet of water for commercial and 120 gallons per minute up to 20 acre-feet of water for irrigation. The permitted place of

use for the commercial use is SE¼SW¼SW¼ and for the irrigation use is 8.00 acres in the SE¼SW¼SW¼ of Section 17, Township 11 North, Range 03 West, Lewis and Clark County, Montana. The permitted means of diversion is a well and pump. The permitted period of diversion for commercial use is from January 1 through December 31, inclusive of each year. The permitted period of use for irrigation is from May 1 through October 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the department to record the flow rate and volume of water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep monthly written records of the flow rate and volume measurements and shall submit the records by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit or change. The records must be submitted to the Water Resources Regional Office. Contact the regional office listed below to obtain their current address.

HELENA PH: 406-449-0944 FAX: 406-442-9315

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The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

C. This right is subject to Mont. Code Ann. '85-2-505 (1997) requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least .50 inch to the static level of the well may be accurately measured.

D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

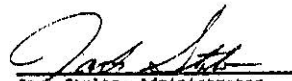
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made,

the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 7th day of September, 1999.


Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 9th day of September, 1999, as follows:

PDG, INC
DOTTY HARDINGER
50 W 990 S
BRIGHAM CITY UT 84302

LARRY MARSHALL, LS
MT ASSOCIATES, INC
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HELENA MT 59601

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HELENA MT 59602

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TERRI MCLAUGHLIN, MANAGER
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MSP. Shulund
Mandi Shulund
Hearings Assistant

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE) PROPOSAL
APPLICATION FOR BENEFICIAL) FOR
PERMIT 411-105511 BY) DECISION
FLYING J INC.)

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on April 27, 1999, in Helena, Montana, to determine whether a Beneficial Water Use Permit should be granted to Flying J Inc. for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1997).

APPEARANCES

Flying J Inc. (Applicant) appeared at the hearing with Dotty Hardinger presenting testimony. Larry Marshall, Civil Engineer with MT Associates, Inc.; David Hoerning, Land Surveyor with MT Associates, Inc.; Larry Wycoff, Certified Water Operator with MT Associates Inc.; Terry Lindsay, Lindsay Drilling; and Mike Kaczmarek, Geologist with Morrison Maierle, Inc., appeared at the hearing as witnesses for the Applicant.

Objector Lawrence Sickerson appeared at the hearing in person.

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Jim Beck, Civil Engineering Specialist (CES) with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

EXHIBITS

Applicant offered 15 exhibits for the record. All, except Exhibit 16, were accepted without objection. The Hearing Examiner declined to accept Exhibit 16 because there was a copy in the file which is a part of the record. Applicant did not offer Exhibits 8 and 9. Objector offered no exhibits for the record.

Applicant's Exhibit 1 is a water surface map prepared by MT Associates, Inc. This map shows the gradient and flow direction of the groundwater in the area of the proposed project.

Applicant's Exhibit 2 is a spreadsheet showing the water elevations of various wells and locations.

Applicant's Exhibit 3 consists of 12 pages and are laboratory analyses of water samples.

Applicant's Exhibit 4 consists of two pages which are the data from the irrigation well during the aquifer test.

Applicant's Exhibit 5 consists of eleven pages. The first page is a copy of Objector Sickerson's well log. The remaining 10 pages are reports from the Groundwater Information Center database of the Montana Bureau of Mines and Geology.

Applicant's Exhibit 6 consists of two pages. The first page is a copy of a topographic map of the project area and

surrounding area. The second page is an enlargement of Section 17, Township 11 North, Range 03 West, Lewis and Clark County, Montana.

Applicant's Exhibit 7 is a survey map showing the location of the proposed project and the property features of the area.

Applicant's Exhibit 10 consists of two pages which are copies of portions of a USGS map upon which has been imposed the altitude and configuration of the shallow potentiometric surface and location of selected wells in the Helena area taken from the Briar and Madison Report.

Applicant's Exhibit 11 is a contour map which shows an underground drain pipe (the dashed line running east and west) installed by the BLM. This drain pipe runs under the proposed project site.

Applicant's Exhibit 12 consists of two pages. The first page is a map showing the fault distribution of the Helena Valley as mapped by Stickney and Schmidt. The second page is a geologic time scale.

Applicant's Exhibit 13 consists of three pages. The first two pages are a letter to Larry Marshall from the Department of Environmental Quality dated January 12, 1999. The third page is the Phosphorus breakthrough calculations.

Applicant's Exhibit 14 consists of 10 pages and a large map. These documents were assembled as the Criteria Addendum to Applicant's application for beneficial water use permit.

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Applicant's Exhibit 15 consists of two documents. The first document consists of eleven pages which are narratives, calculations, charts, and diagrams of the standard operation procedures of a Flying J Travel Plaza and specifics on the proposed Flying J Travel Plaza in the Helena Valley. The second document is the Operations and Maintenance Manual for Flying J's Oil/Water Separator.

Applicant's Exhibit 17 is a copy of a map showing the geologic formations in the Helena Valley.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

PRELIMINARY MATTERS

During the testimony of Terry Lindsay, Objector moved to strike the portion of Mr. Lindsay's testimony which stated Objector's water would be from a different aquifer as hearsay. The Hearing Examiner took the matter under advisement. The Hearing Examiner now denies the motion to strike on the basis that Mr. Lindsay's testimony was not hearsay--he testified about his own observations about groundwater occurrence in the area. Mr. Lindsay is well qualified to testify about such matters. He has completed course work in both geology and hydrology in pursuit of his Bachelor of Science Degree in Forestry Engineering, and has been in the well drilling business in the Helena area for 35 years, drilling many wells in both the bedrock and alluvial aquifers here at issue.

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Also during the hearing Objector moved to leave the record open until DEQ can be contacted to verify the non-degradation requirements have been completed. The Hearing Examiner grants the motion because the criteria for issuance of a beneficial water use permit can be proved whether or not the DEQ has made its non-degradation determination. Objector raises concerns about leaky fuel tanks and stormwater runoff that are for the most part unrelated to removal of groundwater from the proposed well and therefore are not under DNRC's purview. To the extent that Objector is alleging that the well may become a pathway for contaminating the aquifer, that concern is addressed by constructing the well according to the laws, rules, and standards of the Montana Board of Water Well Contractors. See Title 37, Chapter 43, Mont. Code Ann. (1997).

This is not to say that Objector's concerns about the risk to the aquifer presented by Objector's project are not valid. That risk is the very reason for the DEQ's regulation of underground fuel tanks and stormwater discharge. However, the DNRC has neither the jurisdiction nor expertise to evaluate those concerns.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 41I-105511 in the name of and signed by Donald E. and Sharon I. Ferriter was filed with the Department on July 24, 1998. (Department file.)
2. Pertinent portions of the application were published in the Independent Record, a newspaper of general circulation in the

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area of the source, on December 16, 1998. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. One objection to this application was received by the Department. Applicant was notified of the objections by a letter from the Department dated January 13, 1999.

After this application was published, the property was sold to Flying J Inc. and a Water Right Transfer Certificate was filed with the Department on April 30, 1999. This Proposal reflects the change in ownership. (Department file.)

3. Applicant seeks to appropriate 200 gallons per minute up to 60 acre-feet of groundwater at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, Township 11 North, Range 03 West, in Lewis and Clark County, Montana. The proposed uses are 80 gallons per minute up to 40 acre-feet of water for commercial and 120 gallons per minute up to 20 acre-feet of water for irrigation. The proposed place of use for the commercial use is SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and for the irrigation use is 8.00 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, Township 11 North, Range 03 West, Lewis and Clark County, Montana. The proposed means of diversion is a well and pump. The proposed period of diversion for commercial use is from January 1 through December 31, inclusive of each year. The proposed period of use for irrigation is from May 1 through October 31, inclusive of each year. (Department file.)

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4. Applicant has proven by a preponderance of evidence water is physically and legally available in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed by Applicant in the amount Applicant seeks to appropriate and that during the period in which Applicant seeks to appropriate, the amount requested is reasonably available.

Terry Lindsay of Lindsay Drilling performed a 24-hour pump test using an existing irrigation well located approximately 600 feet northeast of the proposed well and taking water from the same aquifer. The well produced 100 gallons per minute with a 28.6 feet drawdown. The recovery after pumping ceased was extremely fast indicating abundant water. During the pump test, the well at the Grubstake Restaurant and Lounge, located approximately 400 feet southeast of the proposed well, and the well at a farm house, approximately 900 feet southwest of the proposed well, were monitored and showed no effect from the pumping of the irrigation well. The small cone of depression indicates the large quantity of water available.

Applicant's consultants have reviewed the Stickney report (1987) and the Briar and Madison report (1992)¹ and have determined the flow through the area to be 190,000 gallons per day and the amount of water Applicant would use would be, during

¹Michael Stickney, a geologist with the Montana Bureau of Mines and Geology, compiled a report on the Quaternary geology of the Helena Valley. The report was published in 1987. Briar and Madison, geologists with the US Geologic Survey, prepared a report titled Hydrogeology of the Helena Valley Fill Aquifer System West Central Montana which was published in 1992.

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high peak flow for complete irrigation and commercial use at the proposed project, 55,000 gallons per day. (Applicant's Exhibits 10, 12, and 17, and testimony of Terry Lindsay, Mike Kaczmarek, and Larry Marshall.)

5. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation would not be adversely affected.

There are three wells with water rights of record in the same quarter section as the proposed well. Two of these wells have a later priority date, March 19, 1999 and January 13, 1999, than the priority date of this application. The third well belongs to Applicant.

There are two pending applications for beneficial water use permits in the area. Both were submitted by Applicant. There are no groundwater reservations in this area.

During the pump test, the well at the Grubstake Restaurant and Lounge and the well at the farm house, were monitored and showed no effect from the pumping of the irrigation well. If these wells were not affected, it is unlikely that other wells located farther away would be affected.

As previously stated in Finding of Fact 4 above, there is abundant water flowing through the alluvial aquifer. Objector Sickerson's well is not located in the alluvial aquifer. It is in the bedrock described as broken shale and clay on the well log. The groundwater level in the bedrock aquifer is higher than

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the alluvial aquifer so the water flows from the bedrock aquifer to the alluvial aquifer. Also, the groundwater in the alluvial aquifer flows from west to east. Objector's well is located northwest of the proposed well. Thus, Objector would withdraw his water before it gets to Applicant. In effect, Objector is upstream from Applicant so Objector's senior water rights, at least in terms of quantity, would not be adversely affected. (Applicant's Exhibits 1, 5, 6, 10, and 17, Department file, and testimony of Mike Kaczmarek, Terry Lindsay, David Hoerning, and Objector.)

6. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate.

The design of the project would be completed by a professional engineer and construction of the project would be under the supervision of a professional engineer. The well would be constructed by or under the supervision of a licensed water well contractor according to specifications for a public well as set forth in the Department of Environmental Quality Rules, Title 16, Chapters 16 and 20, Mont. Admin R. (1997).

Applicant proposes to install a Department-approved in-line flow meter at a point in the delivery line to record the flow rate and volume of water diverted and to keep monthly written records of the flow rate and volume measurements. The appropriator would maintain the measuring device so it always

operates properly and measures flow rate accurately. (Department file and testimony of Mike Kazmarek and Larry Marshall.)

7. Applicant has proven by a preponderance of evidence that the proposed use of water is a beneficial use of water. The proposed uses, irrigation and commercial, are beneficial uses. Mont. Code Ann. § 85-2-102(2)(a) (1997). Applicant's calculations show the flow rates and volumes requested for these uses are reasonable. (Department file.)

8. Applicant has proven by a preponderance of evidence it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicant owns the property where the water is to be put to beneficial use. (Department file.)

9. Applicant has proven by a preponderance of evidence the water quality of a prior appropriator would not be adversely affected.

With the initiation of each irrigation season, Objector's water supply becomes clouded by fine sediments and is less palatable. This condition is probably not caused by increased pumping from the aquifer. The Helena Valley Canal is located very near Objector's home and crosses the bedrock there. The Helena Valley Canal is noted for its leakage. The bedrock is not a solid formation and, in fact, has been described as broken shale. The water from the canal leaks into the bedrock and is most likely responsible for the cloudiness experienced by Objector during the irrigation season. While the alluvial

aquifer is highly permeable, it is still down gradient of the bedrock aquifer where Objector obtains his water.

11. No objections were filed by the Department of Environmental Quality or a local water quality district that the proposed use would not be substantially in accordance with the classification of water set for the source of supply pursuant to Mont. Code Ann. § 75-5-301(1). Nor were objections filed relative to the ability of a discharge permit holder to satisfy effluent limitations of that permit.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-307 (1997).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 11. Mont. Code Ann. § 85-2-311 (1997).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 411-105511 is granted to Flying J Inc. to appropriate 200 gallons per minute

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up to 60 acre-feet of groundwater at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, Township 11 North, Range 03 West, in Lewis and Clark County, Montana. The permitted uses are 80 gallons per minute up to 40 acre-feet of water for commercial and 120 gallons per minute up to 20 acre-feet of water for irrigation. The permitted place of use for the commercial use is SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and for the irrigation use is 8.00 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, Township 11 North, Range 03 West, Lewis and Clark County, Montana. The permitted means of diversion is a well and pump. The permitted period of diversion for commercial use is from January 1 through December 31, inclusive of each year. The permitted period of use for irrigation is from May 1 through October 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the department to record the flow rate and volume of water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep monthly written records of the flow rate and volume measurements and shall submit the records by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation

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or modification of a permit or change. The records must be submitted to the Water Resources Regional Office. Contact the regional office listed below to obtain their current address.

HELENA PH: 406-449-0944 FAX: 406-442-9315

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

C. This right is subject to Mont. Code Ann. § 85-2-505 (1997) requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception

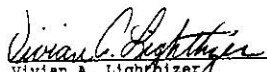
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filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 2nd day of August, 1999.


Vivian A. Lighthizer
Hearing Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served upon all parties listed below this 2nd day of August, 1999, as follows:

PDG, INC
DOTTY HARDINGER
50 W 990 S
BRIGHAM CITY UT 84302

LARRY MARSHALL, LS
MT ASSOCIATES, INC
4528 HWY 12 W
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